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IN THE

Supreme Court of the United States

October Term, 1970

No. 1117

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. MARK FEIN,

Petitioner,

against

HAROLD W. FOLLETTE, Warden, Green Haven State Prison, Stormville, New York,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions and Proceedings Below

The Supreme Court of the State of New York, County of Dutchess, rendered judgment February 16, 1970, dismissing petitioner Mark Fein's writ of habeas corpus. The opinion of the court is reported at 61 Misc.2d 826, 306 N.Y.S. 2d 789; and it is reproduced in petitioner's appendix, pages 3a-14a.

The Supreme Court of the State of New York, Appellate Division, Second Department, by order entered May 25, 1970, unanimously affirmed the judgment of the Supreme Court, Dutchess County. The opinion of the Appellate Division is reported at 34 A.D.2d 835, 312 N.Y.S.2d 331; and is reproduced in petitioner's appendix at pages 1a-2a. Fein's instant petition for certiorari is addressed to the Appellate Division.

The Court of Appeals of the State of New York by order entered July 2, 1970, dismissed, upon respondent's motion, Fein's appeal to the court, taken of right, pursuant to N.Y. CPLR §5601(b)(1), "upon the ground that no substantial constitutional question is directly involved." The decision of the Court of Appeals is reported at 27 N.Y.2d 737, 314 N.Y.S.2d XL; and the order is reproduced in respondent's appendix at page RA1.

Thereafter, the Court of Appeals, by order entered September 24, 1970, denied petitioner Fein's motion for leave to appeal to the Court of Appeals by permission. The decision of the court is reported at 27 N.Y.2d 486, 315 N.Y.S. 2d XLVII; and the order is reproduced in petitioner's appendix, page 35a.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

However, the petition for certiorari may be addressed to the wrong court. Since, as noted, Fein took an appeal of right to the Court of Appeals of the State of New York,

and the court dismissed the appeal of right upon the ground that "no substantial constitutional question is directly involved," the petition for certiorari should, it appears, be addressed to the Court of Appeals of the State of New York. *See*, *Fitts* v. *Wallick*, 306 U.S. 282, 284 (1939), *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Rowe*, 269 U.S. 262 (1925); *also see*, Cohen and Karger, The Powers of the New York Court of Appeals, §§55(e), 56, and 57, pp. 252-61.

Questions Presented

Whether an alleged violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), should result in the vacating of both the conviction and a sentence not of death.

Whether New York's use of a special jury was unconstitutional.

Whether due process was offended when the trial court —at defense counsel's request and in defense counsel's presence but not defendant's—asked the jury if they had read a particular newspaper article about the case and the jury answered, no.

The Applicable Statutes

Section 597 of the New York Judiciary Law, as it appeared at the time of Fein's indictment and trial, stated:

> "No person shall be selected as a grand juror or as a trial juror in a criminal action where the crime charged is or may be punishable by death, who has stated to the county clerk in his examination under oath as required, that he has conscientious scruples against the death

penalty and that such scruples would prevent him from returning an indictment, or by returning a verdict of guilty, of any crime punishable by death. Such scruple shall not, however, hinder the selection of such person to serve as a trial juror in any civil action or in any criminal action other than that specified above."

Former Section 749-aa of the New York Judiciary Law (repealed eff. Sept. 1, 1963) dealt with the selection of special juries and required that special jurors be selected "from the persons qualified to serve as trial jurors" and that:

"No person shall be selected as a special juror * * * who possess such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death. * * *"

Section 336 of the New York Code of Criminal Procedure, entitled Appearance, states:

"If the indictment be for a misdemeanor, the trial may be had in the absence (*sic*) of the defendant, if he appear by counsel but if the indictment be for a felony the defendant must be personally present."

Statement of the Case

This is Mark Fein's third attempt to gain certiorari in this Court.

By indictment, filed February 25, 1964 petitioner Mark Fein was charged with murder in the first degree. Former N.Y. Penal Law §1044. At the time Fein was indicted and tried, the penalty for murder in the first degree included death. Former N.Y. Penal Law §1044 as amended by N.Y. Laws 1963, ch. 994, §1.

Fein's trial in the Supreme Court of the State of New York, New York County, commenced on October 19, 1964. Fein was tried before a special jury; the use of such juries in New York was abolished the following year. Former N.Y. Judiciary Law §749-aa, repealed, 1965 Laws of N.Y., Ch. 778, §3, effective September 1, 1965.

On November 24, 1964 the jury rendered its verdict of guilt of murder in the second degree. Former Penal Law §1046. The statutory penalty for murder in the second degree was an indeterminate prison sentence, the minimum of which could not be less than 20 years and the maximum of which had to be life. Former Penal Law §1048.

After his conviction, Fein was accorded a lengthy hearing on his motion for a new trial. The motion was denied, and on May 26, 1965 Fein was sentenced to imprisonment for 20 years to life.

Fein's judgment of conviction was affirmed by the New York courts. *People* v. *Fein*, 24 A.D.2d 32 (1st Dept. 1965), *aff'd* 18 N.Y.2d 162 (1966), *rem. amd.* 18 N.Y.2d 722 (1966), *rem. amd.* 19 N.Y.2d 691 (1967). Fein's appeal to this Court was dismissed for want of jurisdiction, and certiorari was denied. *Fein* v. *New York*, 385 U.S. 649 (1967), *reh. den.* 386 U.S. 978 (1967).

Thereafter, Fein sought federal habeas corpus relief, raising most of the same claims presented the state courts on his appeal from the judgment. Again, he was unsuccessful. *United States ex rel. Fein* v. *Deegan*, 298 F.Supp. 359 (S.D.N.Y. 1967), *aff'd.* 410 F.2d 13 (2d Cir. 1969), *cert. denied* 395 U.S. 935 (1969).

Upon the heels of this Court's denial of certiorari to the Second Circuit Court of Appeals, the instant writ of habeas

corpus proceeding was instituted in the New York state courts. Again, Fein has been unsuccessful. *People ex rel. Fein* v. *Follette*, 61 Misc. 2d 826 (Sup. Ct. 1970), *aff'd.* 34 A.D.2d 835 (2d Dept. 1970), *appeal dismissed* 27 N.Y.2d 737 (1970), *leave to appeal denied* 27 N.Y.2d 486 (1970).

Summary of Argument

In this state habeas corpus proceeding and application for certiorari Fein makes several claims: First, he challenges as unconstitutional on their face New York Judiciary Law Section 397, and former Section 749-aa (the special jury provision, repealed in 1965, after his judgment of conviction). Both sections in essence permit the exclusion of veniremen who have conscientious scruples against capital punishment which would prevent them from returning an indictment or verdict of guilt where the crime charged was punishable by death. The statutes embody the principle of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), have been so interpreted by New York courts, and are thus on their face constitutional. *People* v. *DiPiazza*, 24 N.Y. 2d 342, 353-4 (1969); *People ex rel. McChesney* v. *La Valley*, 31 A.D. 2d 1 (3rd Dept. 1968), *lv. to app. den.* 23 N.Y. 2d 644 (1969), *cert. den.* 395 U.S. 970 (1969).

Next, in a bald unsupported allegation Fein alleges that those sections were misapplied, and that persons who had conscientious scruples against the imposition of the death penalty were deliberately and systematically excluded from the grand jury that indicted him and from the special jury that convicted him, regardless whether their views would have prevented them from finding a verdict of guilt. He then concludes that if he could, at a hearing, establish such deliberate and systematic exclusion, he will have

thereby proved that he was denied impartial juries and would be entitled to have his judgment of conviction vacated.

However, exactly the same issue, on exactly the same record that Fein thinks he can make at a hearing, was presented to and rejected by this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). *Also see, Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968).

In *Witherspoon*, a state statute authorized such deliberate and systematic exclusion, and "nearly half the venire of prospective jurors" in *Witherspoon* were eliminated by challenging, under the authority of this statute, any veniremen who expressed qualms about capital punishment. *Witherspoon* at 512-13. On that record, this Court found that the deliberate and systematic exclusion of persons opposed to capital punishment regardless of whether their views would prevent them from finding a verdict of guilt or sentence of death did not deprive a defendant of a fair trial on the question of guilt, but rather, denied him a fair determination of whether the death penalty should be imposed. Conversely, if the death penalty had not been imposed, the systematic exclusion of such scrupled jurors would not void the verdict of guilt or sentence. Indeed, in *Witherspoon*, Mr. Justice DOUGLAS, in a separate opinion, made precisely the same argument that Fein now makes, and concluded that *Witherspoon* was denied a fair cross-section of the community on the question of guilt as well as sentence and thus his whole conviction should have been vacated. The majority of the Court, as noted, rejected this argument.

Next, Fein opines that the exclusion of such scrupled jurors resulted in prosecution prone juries. But the Supreme Court, again in *Witherspoon* and *Bumper*, in the face of more supporting evidence than proffered by Fein, rejected the same argument. *Witherspoon* v. *Illinois*, *supra*, at 516-18, also n. 10 p. 517, and n. 16 p. 520; *Bumper* v. *Illinois*, *supra*, at 545, nn. 5 and 6.

Furthermore, not only did Fein never object to the composition of the grand jury or special jury with respect to the exclusion of scrupled jurors, but Fein's eminent counsel, the late William Kleinman, in an affidavit calling upon the court to use a general rather than a special jury, specifically and strategically disavowed any objection to the summary exclusion of anyone "who had conscientious scruples against capital punishment"; thus, Fein is precluded from raising the issue collaterally. *See United States ex rel. Agron* v. *Herold*, 426 F.2d 235 (2nd Cir. 1970).

Next, Fein argues that the special jury which convicted him systematically excluded blue collar workers and women. This argument was made by Fein on his direct appeal from judgment in the state courts and in his federal habeas corpus proceeding. Both jurisdictions rejected the argument and this Court in both instances declined to review the judgments of the state or federal courts. *People* v. *Fein*, 18 N.Y.2d 722 (1966), *rem. and.* 19 N.Y.2d 691 (1967), *appeal dism.* and *cert. denied* 385 U.S. 669 (1967), *reh. den.* 386 U.S. 978 (1967); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13 (2d Cir. 1969) *cert. denied* 395 U.S. 935 (1969). And, this Court has twice rejected the argument on its merits. *Fay* v. *New York*, 332 U.S. 261 (1947); *Moore* v. *New York*, 333 U.S. 565 (1948).

Finally, Fein attempts to argue that he was absent from a material part of the trial. At the end of the fourth week of trial Fein's counsel asked the trial court to inquire of the jurors whether they had seen a particular newspaper article about the trial. The request was made at the bench while both Fein and the jury were in the courtroom. Fein's counsel then also suggested that the inquiry not be made in open court. According to defense counsel's request, the court ordered the jury to the jury room and in the jury room, in the presence of defense counsel but not the defendant, the court asked them if they had seen and read the article. All 12 jurors replied that they had not read the article; one juror said he had seen the article but had not read it. Defense counsel satisfied, everyone proceeded back into the courtroom and the trial continued.

On the basis of his absence from the jury room, Fein claims his conviction is void. However, absence from a proceeding that has no "relation, reasonably substantial to the fullness of his opportunity to defend against the charge" is not a violation of due process—particularly where defendant's absence was occasioned by defense counsel. *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934); *People ex rel. Lupo* v. *Fay*, 13 N.Y.2d 253 (1964), *cert. den.* 376 U.S. 958.

Further, there is ample evidence demonstrating that Fein waived his right to be present.

POINT I

The grand jury that indicted Fein in 1964, and the special jury that convicted him in 1965, were properly constituted [answering Fein's petition I and II, pp. 39-44].

In his first two points Fein essentially argues that the grand jury (I) that indicted him in 1964 and the special jury (II) that convicted him in 1965 were improperly drawn and constituted and thereby denied him due process, equal protection of the laws, and—with respect to the special jury—the Sixth Amendment right to an impartial jury.

Specifically, Fein claims that under Section 597 of the New York Judiciary Law persons who had conscientious scruples against the imposition of the death penalty were systematically excluded from serving on grand jury and special jury panels, that such individuals constitute an identifiable group in society, that the systematic exclusion of such individuals is *per se* constitutionally impermissible, and further results, he suggests, in a prosecution-prone jury;* also, he adds, the special jury panels systematically excluded blue collar workers and women.

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* Technically, it should be noted that Section 597 of the Judiciary Law while applicable to the selection of the grand jury which indicted Fein, did not govern the selection of special juries, only general juries. The selection of special juries was technically governed by former Section 749-aa of the Judiciary Law; however, with respect to the provision regarding individuals with conscientious scruples against capital punishment both sections were alike.

Judiciary Law §597 and former §749-aa are constitutional on their face.

The applicable statutes [Judiciary Law §597 and former §749-aa] do not exclude from grand jury or special jury service individuals opposed to capital punishment. Rather, the statutes exclude only individuals who have such conscientious scruples against the death penalty as would prevent them from finding an indictment or verdict of guilty for a crime punishable by death.* And these statutory prerequisites to grand jury or special jury service embody the principle of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), and have thus been held constitutional [*People* v. *DiPiazza*, 24 N Y 2d 342, 353-4 (1969); *People ex rel. McChesney* v. *LaFaller*, 31 A D 2d 1 (3rd Dept. 1968), *lv. to app. den.* 23 N Y 2d 644 (1969), *cert. den.* 395 U. S. 970 (1969)].

Fein has shown no basis for a hearing to determine whether Judiciary Law §597 and former §749-aa were misapplied by the County Clerk.

Grasping at straws, however, Fein next charges that the applicable statutes were misapplied by the county clerk in that individuals were summarily excluded from grand and special juries simply because they opposed capital punishment, and not, as the statute required, because their opposition to capital punishment would prevent them from rendering a verdict of guilty in a capital case. Fein offers no real proof of this charge, but instead, requests the court to grant him a hearing at which he could examine the county clerk, his records, and even some unspecified number of jurors in

* At the time of Fein's trial for murder in the first degree, New York had not yet substantially abolished capital punishment [*see* N.Y. L. 1965, c. 321, §1, eff. June 1, 1965].

the hope that he could prove his charge. However, no hearing is necessary, for two reasons: First, hearings should not be held willy-nilly on the basis of bald unsupported accusations, particularly where there is a presumption of regularity in the application of the statute [*People* v. *Ferguson*, 55 Misc.2d 711, 719-20 (Sup. Ct. 1968) (SHAPIRO, J.), *upheld* 25 N.Y.2d 728 (1969); *cf. People ex rel. Eich* v. *Wilkins*, 17 N.Y.2d 621, 623 (1966); *People ex rel. Durant* v. *McKendrick*, 30 A.D.2d 1021 (3rd Dept. 1968)].

Second, even if the statutes were, as argued by Fein, misapplied by the county clerk, none of Fein's constitutional rights was infringed upon. For, whether the county clerk properly or improperly applied the statute is irrelevant unless a defendant can show that the particular application made by the clerk was "an invidious discrimination" such that the "ultimate end—a fair * * * jury proceeding—was not obtained" [*Beck* v. *Washington*, 369 U. S. 541, 554-5 (1962); *also see Fay* v. *New York*, 33 U. S. 261 (1947)]. As we shall proceed to show, Fein has in no way demonstrated that his right to a fair jury hearing would have been infringed had the county clerk, as he claims, misapplied the applicable statutes.

Even under Fein's theory that the applicable statutes were misapplied, he was not denied a jury that was representative on the issue of guilt.

Assuming *arguendo* that the applicable statutes were misapplied so as to exclude from juries individuals who opposed capital punishment without inquiring whether their beliefs would prevent them from finding a verdict of guilty in a capital case, it does not follow—as Fein argues—that

such exclusion constituted a *per se* constitutional violation of Fein's alleged constitutional right to a jury chosen from a cross-section of the community. On the contrary, this Court has explicitly held that no *per se* constitutional violation would be demonstrated in a case where the sentence is not death [*Witherspoon* v. *Illinois*, 391, U. S. 510 (1968); *also see Bumper* v. *North Carolina*, 391 U. S. 543 (1968)]. These cases make clear that a defendant who is not sentenced to death is not denied a fair jury on the question of guilt even though the jury does not fully reflect a cross-section of community opinions on the issue of capital punishment. He is entitled only to a jury that is not "unrepresentative on the issue of guilt * * *" [391 U. S. at 518], that is, a jury that is not biased, prosecution prone, or more likely to convict than a jury chosen differently. This Court found no such bias "on the issue of guilt."

Thus, in *Witherspoon* v. *Illinois, supra*, the jury was in fact selected in the manner Fein argues the New York statute was misapplied, *i.e.*, individuals opposed to capital punishment were systematically excluded from the jury even though their scruples may not have prevented them from rendering a verdict of guilty in a capital case. As a matter of public policy the State of Illinois authorized by statute such systematic exclusion:

> "'In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.'" [*Witherspoon v. Illinois, supra* at 512, quoting Ill. Rev. Stat., c. 38, §743 (1959)].

At Witherspoon's trial, "the prosecution eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any veniremen who expressed qualms about capital punishment" [*id.* at 513, *also see* 514-15]. As a result, Witherspoon argued (as does Fein) that his "jury was not chosen from a venire representative of a fair cross section of the community as required by the Sixth and Fourteenth Amendments" [*Witherspoon* v. *Illinois*, Briefs of Counsel, 20 L. ed. 2d 1609; *also see Bumper* v. *North Carolina*, Briefs of Counsel, 20 L. ed. 2d 1613].

The only part of Witherspoon's argument that a majority of the Court would accept was that a sentence of death could not be imposed by a jury from which those opposed to capital punishment were summarily excluded without any further inquiry to determine whether their views would prevent them from finding a verdict of guilt in a capital case. As to the sentence of death, therefore, the Court was satisfied that a jury so selected was not impartial, was not representative of the community [*see Bell* v. *Patterson*, 402 F.2d 394 (1968)]; thus, the Court voided Witherspoon's sentence of death, but only his sentence of death. It did not void Witherspoon's conviction, rendered by the same jury, because the Court held that on the question of guilt juries so chosen were not shown to be biased or prosecution prone, and therefore were not constitutionally unrepresentative of the community on that question:

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the

issue of guilt or substantially increases the risk of conviction" [*Witherspoon* v. *Illinois*, *supra*, at 517-8].

Similarly, in *Bumper* v. *North Carolina*, *supra*, where Bumper was convicted of a capital crime by a jury chosen as in *Witherspoon* but was sentenced to life imprisonment, the Court, following *Witherspoon*, would not reverse the conviction or void the sentence—it not being of death—on the ground that the jury was unconstitutionally composed [*Bumper* v. *North Carolina*, *supra* at 545]. Further proof that the Court in *Witherspoon* and *Bumper* rejected Fein's hypothesis that the summary exclusion from juries of those opposed to capital punishment results in a denial of representative juries on the issue of guilt can be found in an analysis of Mr. Justice Douglas's separate opinion in both cases. Mr. Justice Douglas fully agreed with Fein's hypothesis and for that reason would have reversed Witherspoon's and Bumper's convictions as well as their sentences of death. Thus, in *Bumper*, Mr. Justice Douglas was recorded as adhering to his views in *Witherspoon*: "Since, however, the record shows that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment, he would also reverse on the ground that petitioner was denied the right to trial on the issue of guilt by a jury representing a fair cross-section of the community. *Witherspoon* v. *Illinois*, *supra*, at 523 (separate opinion)" [*Bumper* v. *North Carolina*, *supra*, at 551]. No other member of the Court concurred in Mr. Justice Douglas's opinions.

Thus, in *Witherspoon* and *Bumper*, the Court made it quite clear that a verdict of guilty and a sentence not of death was unimpaired even though individuals who

were opposed to capital punishment were summarily and systematically excluded from the jury without any inquiry to determine whether their views would prevent them from finding a defendant guilty in a capital case.

The special jury system did not unconstitutionally discriminate against blue collar workers or women.

Three times Fein has sought and failed to obtain review by this Court of his claim, rejected by the state and federal courts, that the special jury system was unconstitutional. *Fein* v. *New York*, 385 U.S. 649 (1967) dismissing an appeal from and denying certiorari to the New York Court of Appeals, 18 N.Y.2d 162, 168, *rem. amd.* 19 N.Y.2d 691 (1967); *Fein* v. *New York*, 386 U.S. 978 (1967) denying a rehearing; *Fein* v. *Deegan*, 395 U.S. 935 (1969) denying certiorari to the Second Circuit Court of Appeals, 410 F.2d 13, 22-3 (1969). On this his fourth attempt to have this Court review the constitutionality of the special jury, Fein presents no evidence of such systematic and deliberate exclusion of blue collar workers and women of greater import than previously presented this Court, the Second Circuit Court of Appeals, or the New York courts. In fact, Fein's present brief on the subject is substantially similar to the brief presented this Court and the Second Circuit Court of Appeals in his federal habeas corpus proceeding.

Moreover, the claim that special juries unconstitutionally discriminate against blue collar workers and women and for that reason may be prosecution prone has been raised by many defendants besides Fein, and has been consistently rejected. *Hall* v. *Johnson*, 186 U.S. 489 (1901); *Fay* v. *New York*, 332 U. S. 261 (1947); *Moore* v. *New York*,

333 U. S. 565 (1948); *Vanderwyde* v. *Denno*, 113 F.Supp. 918 (S.D.N.Y. 1953) *aff'd.* 210 F.2d 105 (2d Cir. 1954) *cert. den.* 347 U. S. 949 (1954); *People* v. *Dunn*, 157 N.Y. 528 (1899); *People* v. *Meyer*, 162 N. Y. 357 (1900); *People* v. *Agron*, 10 N Y 2d 130, 141 (1959) *cert. den.* 368 U. S. 922 (1961); *People* v. *Bloeth*, 16 N Y 2d 505 (1965); *People* v. *Maggiore*, 16 N Y 2d 1009 (1965); *People* v. *Torres*, 17 N Y 2d 820 (1966) *rem. amd.* 18 N Y 2d 749 (1966); *People* v. *Horton*, 18 N Y 2d 355 (1966); *People* v. *Jackson*, 20 N Y 2d 440 (1967) *cert. den.* 391 U. S. 928 (1968); *People* v. *Donohue*, 20 N Y 2d 824 (1967)]. Indeed, it is curious why Fein even bothers citing, for example, statistics from *Moore* v. *New York*, *supra*, which he claims prove that special juries which excluded such individuals were prosecution prone, when *Moore* held that those statistics did not prove that special juries were prosecution prone. Similarly, Fein relies on a 1952 Judicial Council report on special juries, which report the federal courts specifically rejected [*Vanderwyde* v. *Denno*, *supra*], and which itself observes:

> "[T]here are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated * * *" [*id.* at 159].

Further, New York may not have, in the instant habeas corpus proceeding, passed on the merits of Fein's challenge to the special jury, since New York has the salutary rule that a state writ of habeas corpus cannot be used to relitigate the same issues raised and decided on one's

appeal from judgment. *See People ex rel. Rohrlich* v. *Follette*, 20 N.Y.2d 297, 301 (1967); *People ex rel. Gallo* v. *Follette*, 32 A.D.2d 1051 (2d Dept. 1969); *lv. to appeal denied* 26 N.Y.2d 609 (1970); *cf. People* v. *Terry*, 26 N.Y. 2d 265 (1970). And, the opinion of the Appellate Division in the instant case as to issues, other than those presented under *Witherspoon*, merely indicated that it found the "other points" raised by Fein "without merit."

In short, the special jury, an institution of the past in New York, did not unconstitutionally discriminate against blue collar workers and women, and Fein has had his days in court on the issue.

Moreover, Fein should not be heard to complain of a procedure he specifically concurred in.

At no time prior to judgment did Fein protest on any grounds the composition of the grand jury panel, nor did he challenge the composition of the special jury with respect to the exclusion of those opposed to capital punishment. On the contrary. Fein's eminent counsel, the late William W. Kleinman, in his affidavit calling upon the court to use a general rather than a special jury, specifically disavowed any objection to the exclusion from the trial jury of any individual opposed to capital punishment:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than that the former must entertain a belief in capital punishment while the latter need not * * *.
>
> "Since ordinary jurors and special panel jurors have the same qualifications there is no reason for any delay. One question to the assembled panel of ordi-

> nary jurors would dispose of any who had conscientious scruples against capital punishment" [Kleinman's Affidavit, Respondent's Appendix, pp. RA4-7].

Then, during the selection of the trial jurors from the special jury panel, Fein did not register any objection to the questions propounded or the challenges exercised peremptorily or for cause; in fact no request was even made for the voir dire to be recorded. And Fein's ultimate satisfaction with the jury is indicated by his failure to exercise all of his allotted peremptory challenges [*cf. People* v. *DiPiazza*, 24 N.Y.2d 342, 348 (1969)].

New York permitted Fein prior to trial to challenge on constitutional grounds the composition of the grand or special jury panels. *See e.g., People* v. *Dessaure*, 299 N.Y. 126 (1949), *cert. den.* 377 U.S. 949; *People* v. *Agron*, 10 N.Y.2d 130 (1961), *cert. den.* 368 U.S. 922; *also see* N.Y. Code Crim. Proc. §363. And, unlike Illinois in the *Witherspoon* case, New York permitted Fein at the trial to object to the dismissal for cause of any special juror who indicated opposition to capital punishment unless further examination revealed that such beliefs would prevent the jurors from rendering a fair verdict [Code Crim. Proc. §337 (8); *see People* v. *Fernandez*, 301 N.Y. 302 (1950) *cert. den.* 340 U.S. 914].

Consequently, not having properly objected to the composition of the grand or special jury panel or of the special jurors chosen to hear his case, with respect to the exclusion of individuals opposed to capital punishment, and indeed, having affirmatively disavowed any prejudice as a result of such exclusion, Fein cannot now be heard to complain. *Parker* v. *North Carolina*, 397 U.S. 790, 798 (1970); *Michel*

v. *Louisiana*, 350 U.S. 91 (1955); *United States* v. *Ragland*, 375 F.2d 471, 475 (2d Cir. 1967), *cert. den.* 390 U.S. 925; *People* v. *Cosmos*, 205 N.Y. 91 (1912); *People* v. *O'Keefe*, 281 A.D. 409 (3rd Dept. 1953), *aff'd.* 306 N.Y. 619 (1953); *see People* v. *Terry*, 26 N.Y.2d 265, 268 (1970); *cf. People* v. *DeRenzzio*, 19 N.Y. 2d 45 (1966).

> "The Constitution in guaranteeing the accused in a criminal case the 'Assistance of Counsel for his defence' deals neither with a shadowy figure standing beside the accused nor with an abstract idea. It envisages a lawyer, skilled in advocacy, a match for the prosecutor, and in full control of the management for the defense of the trial.
>
> "If such a lawyer chooses not to raise a point of constitutional law in a professionally competent defense, either because he believes he could use material affirmatively to advantage or because he believes it better for his client not to raise it, we would work fundamental changes in the adversary system if we determine he should have done that which he had decided advisedly not to do" [*People* v. *DeRenzzio, supra; also see Henry* v. *Mississippi*, 379 U.S. 433, 451-2 (1965); *United States ex rel. Agron* v. *Herold*, 426 F.2d 125 (2d Cir. 1970)].

Nor is it unreasonable to have required an objection:

> "The jury system is a sacred institution, but it is also a very practical one. The individual has his rights, but so has the state. It would be no less intolerable than impracticable if, after every trial, there could be an investigation into matters affecting the qualifications of jurors which are readily ascertainable in advance. Such procedure would place a premium upon the neglect to ascertain whether a juror is qualified, for few men would challenge a juror if by their failure

to do so they could gain a chance for a new trial in case of defeat" [*People* v. *Cosmos*, *supra*, at 180; *also see United States* v. *Ragland*, *supra* at 675].

Fein has not presented sufficient evidence to support his supposition that prosecution proneness resulted.

In the New York courts Fein also argued that he would prove at a hearing that "death-qualified jurors are partial to the prosecution on the issue of guilt or innocence." (Fein's brief in the New York Supreme Court, Appellate Division, Second Department, p. 302, which brief was submitted to the New York Court of Appeals in opposition to the motion to dismiss his appeal of right). Undoubtedly realizing his inability to prove that special juries and juries which exclude those opposed to capital punishment are prosecution prone, he now merely makes the naked assertion that he believes such juries are prosecution prone and that he need not demonstrate the truth of his belief; he holds that the systematic exclusion of scrupled juries in itself demonstrates the existence of an unfair jury and requires the vacating of his conviction, regardless of his inability to show that the jury was prejudice. *Witherspoon*, as demonstrated, specifically declined to vacate a conviction where there had been systematic exclusion from juries of individuals opposed to capital punishment. And, *Witherspoon*, on more evidence than here presented or proffered, declined to find that such juries were, as a result, prosecution prone. *Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 516-18, also n. 10 p. 517, n. 16 p. 520; *see Bumper* v. *North Carolina*, *supra*, 391 U.S. at 545, nn. 5 and 6. In fact, this Court in *Witherspoon* was, *inter alia*, presented

with "a study based upon interviews with 1,248 jurors in New York and Chicago" which found that juries from which those opposed to capital punishment were summarily excluded, were prosecution prone. The Court found the study insufficient to prove the hypothesis satisfactorily to a court of law [*Witherspoon* v. *Illinois*, *supra*, at 517 n. 10; *also see Bumper* v. *North Carolina*, *supra*, at 545 n. 6].

Fein raised the same issue for the first time in his federal habeas corpus petition, and the Second Circuit Court of Appeals — though holding that it was not formally passing on the merits since Fein had not then exhausted his state remedies on the issue — in *dicta* followed *Witherspoon* and found the claim meritless. The Second Circuit Court of Appeals also correctly indicated that "Witherspoon does hint * * * that the law may change on a different record [but] the studies and reports cited to us [by Fein] are the same as those cited to the Court in *Witherspoon* and *Bumper*. Thus, a different result could not be supported on the present law" [*United States ex rel. Fein* v. *Deegan*, *supra*, 410 F.2d at 23]. And, Fein still offers us no additional evidence; any hearing held to test his hypothesis would truly be in the nature of a fishing expedition in search of evidence to sustain his opinion. *Witherspoon* did not countenance such a result. Neither have courts that have, subsequent to *Witherspoon*, been presented with Fein's prosecution-prone hypothesis and in several cases with more supporting evidence than offered by Fein. *People ex rel. McChesney* v. *La Vallee*, *supra*, 31 A.D.2d 1 (N.Y. 3rd App. Dept. 1968); *Bailey* v. *United States*, 405 F.2d 1352, 1355-6 (D.C. Cir. 1968); *State* v.

Forcella, 245 A.2d 181, 192-3 (N.J. 1968); *Curtis* v. *State*, 243 A.2d 656 (Md. 1968); *People* v. *Hough*, 243 N.E.2d 520, 525-6 (Ill. 1968); *In re Anderson*, 447 P.2d 117, 122-3 (Calif. 1968); *State* v. *Madden*, 449 P.2d 39 (Ariz. 1969); *In re Arguello*, 452 P.2d 921, 923 (Calif. 1969); *In re Eli*, 454 P.2d 337, 339 (Calif. 1969); *State* v. *Peele*, 161 S.E.2d 568, 574 (N.C. 1968); *State* v. *Williams*, 165 S.E.2d 481, 487 (N.C. 1969); *Joseph* v. *Mississippi*, 218 So. 734, 736 (Miss. 1969); *Parks* v. *Texas*, 437 S.W.2d 554, 558 (Tex. 1969)]. And none of the courts which rejected Fein's hypothesis even considered the evidence before them sufficient to remand the case for a hearing; in fact, the high courts of New Jersey and California specifically rejected a defendant's request for a hearing [*State* v. *Forcella*, *supra*; *In re Anderson*, *supra*; *In re Arguello*, *supra*; *In re Eli*, *supra*]. Thus, in *State* v. *Forcella*, *supra*, the defendant's offer of proof consisted of the same materials presented to the Supreme Court in *Witherspoon* plus some "sociological or psychological studies, some under way and others not yet undertaken." In denying the defendant his hearing the court held:

> "But while we welcome whatever aid we can get and would reach for data already in being, we cannot suspend the judicial process until projected studies are made at the behest of a litigant. This is especially true when the studies are of sociological or psychological nature, for the prospect is remote that such studies will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area" [*id.* at 193].

Indeed, the various factors, psychological and otherwise that would have to be dealt with, and which Fein does not, are formidable; for example:

> "While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right. If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say, even were we to examine the cases in detail, whether the difference in percentage of convictions indicated a too great readiness to convict on the part of special juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases" [*Fay* v. *New York, supra,* at 280-1].
>
> "• • • [I]t appears that in Bronx County [and New York County] a system of special and intensive investigation is applied to capital cases from the moment they are reported, more careful preparation is given them and they are tried by the most experienced prosecutors. This makes this class of cases not fairly comparable with the run-of-the-mill cases, felony and misdemeanor, that are included in the ordinary jury statistics" [*Moore* v. *New York,* 333 U. S. 565 (1948)].

Thus, it is significant that the jury, which Fein alleges was prosecution prone because persons opposed to capital punishment were allegedly summarily excluded, acquitted him of the capital offense, murder in the first degree; the Appellate Division, which has jurisdiction to review the facts as well as the law, affirmed his conviction for murder in the second degree; the Court of Appeals, which has jurisdiction over questions of law, affirmed his conviction; and the federal courts, which can review alleged deprivations of federal constitution rights, upheld his conviction. And the statutory requirements that special jurors be able to ignore prejudicial publicity relating to the criminal action, that they not have "such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense," and that they be able to discount in accord with the statute the failure of a defendant to take the stand, could hardly be deemed qualifications designed to secure prosecution prone juries [former Judiciary Law §749-aa (2)].

POINT II

Fein's absence from a proceeding to determine whether the trial jurors were prejudiced by a newspaper article did not violate due process; moreover, Fein waived his right to be present at the proceeding [answering Fein's petition, III, pp. 45-50].

Fein's trial lasted some 5 weeks; towards the end of the fourth week of trial, on November 18, 1964, while Fein, his counsel, the prosecutor, and the jury were present in court, Fein's counsel, William Kleinman, requested permission to approach the bench. There, with the prosecutor present

and out of the hearing of the jury, Kleinman showed the court a newspaper article concerning the Fein trial that appeared in the now defunct *New York Herald Tribune* under the by-line of Jimmy Breslin. Thanking and expressing appreciation to the court for having "very scrupulously" instructed the jury to avoid such articles, Kleinman requested:

> "I should ask your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.
>
> "The Court: Do you want me to do that in open court or what?
>
> "Mr. Kleinman: I leave it entirely to your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it."

The prosecutor agreed; and the court, acceding to the request, ordered the jury to retire to the jury room. The court, prosecutor and defense counsel followed the jury into the jury room, but it appears from the record that Fein himself, although in court during the discussion at the bench, was not brought into the jury room.

In the jury room, the court asked the jurors if they had seen the article. One juror stated he had seen the article but added that he hadn't read it. The court then, as it had done on more than 80 separate occasions during the trial, warned the jurors "not to look at or read anything pertaining to this case" and further advised them that a failure to abide by its order would subject them to imprisonment. The jurors again stated that they had not read the article,

and everyone proceeded back into the courtroom and the trial resumed [*see*, minutes of the trial, Respondent's Appendix, pp. RA8-11].

Based on his alleged absence from the court's voir dire of the jurors in the jury room, Fein argued that the prescription of New York's Code of Criminal Procedure Section 356*—that on a trial for a felony "the defendant must be personally present"—was violated as well as the due process clause of the Fourteenth Amendment. Fein is wrong.

As the Court of Appeals has explained, the right to be present at one's felony trial "must be kept within the limits of common sense and reason. It is not literally true that after indictment nothing may validly be done in the defendant's absence * * *" *People ex rel. Lupo* v. *Fay*, 13 N.Y.2d 253, 256 (1964), *cert. denied* 376 U.S. 958 (1964).

In New York a defendant's presence at a post-indictment proceeding has been specifically held required where "testimony [evidence] is being taken, or counsel are summing up, or the jury is being instructed [charged] by the court, or when the verdict is rendered or sentence pronounced" [*People ex rel. Lupo* v. *Fay*, *supra* at 257; *Maurer*

* Fein also argued that Section 427 of the Code was violated. However, a simple reading of that statute demonstrates that it is patently inapplicable to the facts here presented. For, the statute reads:

> "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant."

v. *People*, 43 N.Y. 1 (1870); *People ex rel. Bartlam* v. *Murphy*, 9 N Y 2d 550 (1961); *People* v. *Anderson*, 16 N Y 2d 282 (1965); *see People ex rel. McBride* v. *Fay*, 14 N Y 2d 843 (1964) *cert. den.* 380 U. S. 982], or where the court or court official—without even the knowledge of defense counsel—communicates secretly with a juror or a witness [*People* v. *Colascione*, 22 N Y 2d 65 (1968); *also see People* v. *Insoqua*, 28 A D 2d 771 (3rd Dept. 1967); *People* v. *Saccommano*, 25 A D 2d 528 (2d Dept. 1966)]. And, in judging whether absence from a particular post-indictment proceeding voids a judgment, the Court of Appeals has accepted the rule of *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934) (Cardozo, J.) as "a sound, fair guide for decision in such cases":

> "Due process, held the Supreme Court in *Snyder*, mandates the presence of a defendant at his felony trial to the extent only that his presence is necessary for a fair and just hearing of his cause and he must be deemed to have the absolute right to hear everything the jury hears (cit. omit.) so that his may be the opportunity to confront his accusers and advise with his his counsel. Justice Cardozo wrote that the inquiry should be: whether the defendant's presence at the particular trial stage had 'a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'" [*People ex rel. Lupo* v. *Fay*, *supra* at 256; *also see People* v. *Anderson*, *supra*, at 287].

Clearly, Fein's absence from the court's voir dire of the jury with respect to whether they had seen a particular newspaper article did not have a "relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" of murder. The court's inquiry was completely tangential to the trial on the merits of Fein's guilt of mur-

der. No evidence for or against Fein on the charge of murder was presented to the jury. The truth of the article was not in issue, but rather its effect on the jury, a matter that Fein was in no position to cast light upon. The defendant's belated assertion of prejudice is belied by the conduct of astute counsel at trial, who, to protect his client, initiated the proceeding here in question, but saw no reason why Fein should be present, instead welcoming the opportunity to inquire of the jury outside the courtroom. Indeed, such a proceeding may not even properly be deemed a part of the "trial." It is more of an administrative proceeding undertaken by the trial court, while a trial is in progress, in order to guarantee the defendant a fair hearing during the trial [*see People* v. *Sher*, 24 N Y 2d 454 (1969), *cert. den.* 396 U. S. 837]. Neither Fein's presence (nor that of any lay defendant) could realistically have been of material assistance to his lawyer on such an inquiry, as it could, for example, during the taking of testimony relating to the substantive charge [*see People* v. *Anderson, supra*]. Even in his instant petition, with the aid of new counsel, and with the freedom of hindsight and self-serving declarations, Fein is unable convincingly to demonstrate that his presence could have made any difference in the outcome of the voir dire:

> "Had I been present * * * I would have asked the juror who saw the article, 'what did he see, what was the headline? Did he see the subheadings, "A look of Hate" and "A dazed Son?" What were his reactions to these subheadings' * * * I would not have the juror who saw the article to continue as a juror. I would have insisted through my counsel on further questioning not only of this juror but of the other jurors" [Fein's petition, petitioner's appendix, p. 25a].

The article's subheadings, even if seen, were meaningless unless the article was read. Eleven jurors had not even seen the article. Fein would have had no cause to dismiss the juror who saw but did not read the article [*People* v. *Lynch*, 23 N Y 2d 262 (1968); *People* v. *Sher*, *supra*]. And it borders on the absurd for Fein (or any lay defendant) to suggest that with respect to a matter not involving the merits of, or facts surrounding, the charge of murder he would have told his counsel how to proceed—counsel whom the Second Circuit Court of Appeals described as "an experienced and skillful defense attorney [who] knew how to focus attention upon his client's rights" [*United States ex rel. Fein* v. *Deegan*, *supra*, at 21]. The trial of the case was in counsel's able hands; he reasonably concluded that the defendant's interests were fully protected by the proceeding that occurred.

Further, convincing evidence that Fein's presence could not have affected the outcome of the voir dire of the jurors can be discerned by the comments made by Mr. Justice CULKIN in his opinion denying Fein's post-conviction motion for a new trial:

> "Defendant's contention that prejudicial newspaper publicity 'influenced the jury' is a totally unwarranted charge. In fact, indications are exactly to the opposite, for at least one juror was exhaustively questioned by a representative for the defendant during the course of this trial motion and the defense announced its contention (*sic*) of speaking to other jurors on this subject. Without examining the propriety of this (cit. omit.) it is a fact that not one offer has been forthcoming which would tend to connect newspaper and magazine stories with the jury's deliberations" (3896).*

* Numerical references are to pages of Fein's record on his appeal from judgment. The voluminous appeal record was part of the instant habeas corpus record. See Respondent's Affirmation In Opposition in Respondent's Appendix, p. RA3.

And, it cannot be said that the article itself prejudiced Fein's right to a fair trial, since that argument was rejected by both the New York courts on Fein's appeal from judgment and by the Federal courts in Fein's federal habeas corpus petition [*see, e.g.*, opinion of Palmieri, D.J., 298 F. Supp. 359, 364].

Finally, the majority of the federal circuits will not reverse a conviction on such a claim, even on direct appeal from judgment, where defendant's absence did not prejudice him [*see e.g., United States* v. *Houlihan*, 332 F.2d 8, 13 (2d Cir. 1964); *United States* v. *Woodner*, 317 F.2d 649, 652 (2d Cir. 1963), *cert. den.* 375 U. S. 903 (1963); *United States ex rel. Shapiro* v. *Jackson*, 263 F.2d 282, 283 (2d Cir. 1959); *Glouser* v. *United States*, 296 F.2d 853 (8th Cir. 1961), *cert. den.* 369 U. S. 825 (1962); *Cox* v. *United States*, 309 F.2d 1 (8th Cir. 1962) and cases there cited; *Root* v. *Cunningham*, 344 F.2d 1 (4th Cir. 1965); *Ware* v. *United States*, 376 F.2d 717 (7th Cir. 1967) and cases cited at 719 n. 6].

In short, it is absurd for Fein to suggest that the court's voir dire of the jury "had a relation, reasonably substantial to the fullness of his opportunity to defend against the charge" such that his presence was indispensible. On the contrary, Fein's absence "did not affect any substantial right of his and did not invalidate the subsequent judgment of conviction" [*People ex rel. Lupo* v. *Fay, supra* at 257].

Moreover, it is clear that Fein waived any right to be present, as well he may [*see People ex rel. Lupo* v. *Fay, supra* at 257 and cases there cited; *also see People ex rel.*

Wilder v. *Markley*, 26 A.D.2d 542 (2d Dept. 1967), *app. dism.* 26 N.Y.2d 648 (1970)]. First it is important to understand exactly what Fein alleges concerning his knowledge about the Breslin article and the proceedings in the jury room:

> "I did not know about the Breslin article. Therefore, I could not consult with my counsel about it. I did not know what was going on when the trial judge was conducting his voir dire of the jurors in the jury room about the Breslin article. I was not present, nor was I asked to be present." Fein's petition, petitioner's appendix, p. 26a.

The core of Fein's sworn statement, therefore, is that in addition to being absent from the proceedings, he did not know prior to or during the proceedings about the article or the nature of the proceedings. However, Fein never states exactly when he first learned either about the Breslin article or about what took place in the jury room.

At oral argument in the court below in the instant proceeding, however, Fein's counsel represented:

> "Now, Mark Fein came upon this part of the record up a Green Haven during the thirteen months that I was waiting for a decision from the Court of Appeals for the Second Circuit. * * * And he, reading this record up there, finds out that for this important part of the proceedings, he wasn't even present" [minutes of oral argument, November 26, 1969, before Mr. Justice Grady, Supreme Court of the State of New York, County of Dutchess, page 20].

The record, however, is not consistent with Fein having first learned of this proceeding some years after the event.

Subsequent to Fein's conviction and prior to his sentence, Fein made a motion for a new trial, alleging *inter alia* that he was denied a fair trial due to unfavorable publicity. In his motion papers (144B) and then during the oral argument of the motion, Fein's then counsel, Louis Nizer, Esq., made reference to the article and proceeding; and Fein himself was present during the oral argument (3695, 3758, 3792-3, 3800, 3838, 3842):

> "[Mr. Nizer]: I shall skip the next point, just advert it, Your Honor. It's one of our motions: The jury was influenced by out of court statements in the press.
>
> "One of the jurors said he read one of these terrible stories which turned out to be totally untrue, but he said it wouldn't affect him, and he remained in the jury. Some of these—
>
> "Mr. Dermody [Assistant District Attorney]: Just a moment, Your Honor. I can't sit by. The juror did not say he read this. You recall you questioned him yourself, Your Honor. He said he saw the heading, and he discarded it immediately.
>
> "Mr. Nizer: What did he say, Mr. Dermody?
>
> "Mr. Dermody: He didn't say he read it.
>
> "Mr. Nizer: He saw it and didn't read it. I stand corrected. He saw the article and didn't read it" (3792-3).

In his argument in reply, the assistant district attorney made reference to the incident:

> "A great deal of hub-bub about the fact that one of the columnists wrote a story disparaging the defendant.
>
> "The jurors were questioned about it. Everybody was very much concerned about it" (3838).

Thus, more than five years ago, at the time of his motion for a new trial prior to his sentence, Fein was put on notice of the article and proceeding. And although section 465 of the Code of Criminal Procedure authorizes the granting of a new trial "when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application * * * When the trial has been had in his absence, if the indictment be for a felony * * *," Fein made no such application.

Furthermore, the record indicates Fein was in court when his counsel first approached the bench with the Breslin article, and was in court when his counsel, the prosecutor, the judge, and the jurors retired to the jury room. That Fein did not ask his counsel about the allegedly strange—at least to him—sequence of events that had transpired before his eyes strains credulity. But, it is incredible that Fein's eminent counsel and the other attorneys in the defendant's camp did not see that Fein was informed of everything that took place outside his hearing or presence. Indeed, while memories of the incident have dimmed—understandably given the 5 years that have passed and the inconsequential nature of the incident*—Mark Landsman, Esq. who, while not counsel of record, assisted Mr. Kleinman, has reported that it was the "practice" of Fein's counsel "during the trial to keep Fein informed of the proceedings and conversations that took place out of his presence or earshot during the course of the trial" [*see* Respondent's Affirmation In Opposition, in Respondent's Appendix, pp. RA3-4].

* The entire proceeding from the time defense counsel approached the bench until after the court's voir dire of the jury encompassed 3½ pages of a record on appeal that encompassed volumes.

In his briefs in the New York appellate courts and federal courts, Fein again was quick to refer to the Breslin article and the results of the court's voir dire in an attempt to support his claim of prejudicial publicity. At no time, however, either immediately after the voir dire, during his motion for a new trial, on his direct appeal from judgment, or in his federal habeas corpus proceeding did Fein raise his present claim, assert ignorance of the proceedings or complain of his physical absence. His failure to object at any of these stages of his proceedings would by itself be sufficient to charge Fein with having waived his present claim [*United States* v. *Re*, 372 F.2d 641, 644-5 (2d Cir. 1967)]. But there is more. For, it must be remembered that Fein's counsel called the Breslin article to the trial court's attention, counsel requested the court to ask the jurors only "if they happened to see or look at" the article, counsel suggested that the court not question the jury in open court, where Fein was present, and counsel did not request that Fein be taken from the court to the jury room (see Respondent's Appendix, pp. RA8-11). The entire incident, therefore, was of the defense's own making; it constituted an affirmative act of trial strategy by Fein's counsel. To assert that Fein may now—more than 5 years after judgment and knowledge of the incident—raise an objection to a proceeding his counsel instigated, is to make a mockery of justice and concepts of fairness [*see People* v. *DeRenzzio*, *supra*, 19 N.Y.2d 45 (1966); *People* v. *O'Keefe*, 281 A.D.2d 409 (3rd Dept. 1953), *aff'd.* 306 N.Y. 619 (1953); *People* v. *Bragle*, 88 N.Y. 585 (1882)].

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
WILLIAM C. DONNINO
Assistant District Attorneys
Of Counsel

RESPONDENT'S APPENDIX

Order of the New York Court of Appeals Dismissing Fein's Appeal of Right Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of July A. D. 1970.

Present,

Hon. STANLEY H. FULD, *Chief Judge, presiding.*

2 Mo. No. 603

THE PEOPLE &c. *ex rel.* MARK FEIN,

Appellant,

vs.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is directly involved.

A copy

[SEAL]

Gearon Kimball
Deputy Clerk

Respondent's Affirmation in Opposition

SUPREME COURT OF THE STATE OF NEW YORK

County of Dutchess

The People of the State of New York,
ex rel. Mark Fein,

Petitioner,

against

Harold W. Follette, Warden of Green Haven Prison,
Stormville, New York,

Respondent.

William C. Donnino states that he is an Assistant District Attorney, of counsel, to Frank S. Hogan, District Attorney for the County of New York, co-counsel with Louis J. Lefkowitz, Attorney General for New York State in behalf of respondent and do hereby affirm, under penalty of perjury, that the following statement is true.

This affirmation is made in opposition to Mark Fein's petition for a writ of habeas corpus.

Respondent denies upon information and belief each and every material allegation set forth in the petition for the reasons and to the extent stated in respondent's brief, incorporated by reference herein.

The undersigned further states that within the last two weeks he has spoken with and was informed by Mark Landsman, Esq.—an attorney who assisted one of Fein's trial counsel, the late William Kleinman—that although

he (Landsman) has no independent recollection of any conversation wherein he related to Fein what took place in the jury room on November 18, 1964, it was the practice of counsel during the trial to keep Fein informed of proceedings and conversations that took place out of his presence or earshot during the course of the trial.

For the convenience of the court certain other exhibits have been reproduced and attached to respondent's brief; namely, Exhibit A: Fein's point on the special jury in his brief in the New York Court of Appeals; Exhibit B: Fein's point on the special jury in his brief in the Second Circuit Court of Appeals; Exhibit C: William Kleinman, Esq. affidavit in opposition to the district attorney's request for a special jury; Exhibit D: The relevant proceedings of November 18, 1964. Further, for the purposes of this proceeding Fein's record on appeal, part of which respondent refers to in its brief, respondent would have deemed as part of the record in this proceeding to be made available to the court upon request.

Dated: November 14, 1969
New York, New York

William C. Donnino

Affidavit of William W. Kleinman in Opposition to Special Jury 6/18/64

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Indictment No. 760-1964

THE PEOPLE OF THE STATE OF NEW YORK,

against

MARK FEIN,

Defendant.

State of New York)
County of Kings) ss.:

WILLIAM W. KLEINMAN being duly sworn deposes and says:

I am an attorney duly admitted to practice law and am one of the attorneys representing the above-named defendant.

I make this affidavit in opposition to the District Attorney's motion for an order directing that a special jury be drawn and selected pursuant to the provisions of Article 18-B, Section 749-aa of the Judiciary Law to try the issues raised by the indictment herein. Section 749-aa provides as follows:

"4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action

triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action * * * may apply for a special jury to try such issue. * * * Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly."

The District Attorney's affidavit attached to his moving papers makes several conclusory statements which merely follow the language of the statute. No factual background is recited to provide any basis for these conclusions.

The qualifications of a member of a special panel and that of a member of a regular panel are the same other than that the former must entertain a belief in capital punishment while the latter need not.

Therefore, it is reasonable to assume that a panel of regular jurors would find no greater difficulty than special jurors in dealing with intricate questions of law and fact.

In practically every prosecution for murder in the first degree the jurors are called on to determine whether or not

there was an intent to kill, and whether the killing was committed with premeditation and deliberation.

The fact that the jury in this case may also be confronted with deciding whether or not the killing was committed in the heat of passion without an intent to kill does not create any "intricate questions of law and fact" which can be resolved only by special panel jurors.

The District Attorney further claims that, since the question of the death penalty may be involved, unnecessary delay and difficulty will be encountered by an attempt to obtain an ordinary jury.

Since ordinary jurors and special panel jurors have the same qualifications there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment.

As Justice M. Henry Martuscello said in denying a motion for a special panel jury in *Schuster* v. *City of New York*, 25 Misc. 2nd 670 (1960) at 684:

> "Juries were intended to serve as instruments of justice. They cannot fulfill that purpose unless they are truly representative of the community. There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status. Responsibility in our democracy should be shared by all and not a few, and this responsibility extends to passing upon important and serious questions that arise in our courts of justice.

Affidavit of William W. Kleinman in Opposition

> "Juries of character, courage, and independence can only exist in an atmosphere where there is no discrimination in their choice because of social, economic or philosophic reasons. There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes and there is no valid reason why it should continue until the end of time."

It is respectfully submitted that not only has the District Attorney failed to advance a valid factual reason for a special panel jury but that in view of the identical qualifications of the two types of jurors the motion should be denied. This Court should not permit the myth of the superiority of special panel jurors to be perpetuated in this enlightened day. Integration of the citizens of this community is a command of the Supreme Court of the United States and distinctions sought to be created by recourse to a statute no longer valid or viable should be firmly rejected. To do otherwise violates the defendant's rights and privileges mandate by the Constitution of the United States.

WHEREFORE, the motion for a special panel jury should be denied.

WILLIAM W. KLEINMAN

Sworn to before me this
18th day of June, 1964

MARK A. LANDSMAN
Notary Public, State of New York
No. 41-2245425 Qual. in Queens Co.
Cert. filed in Kings County
Term Expires March 30, 1965

Pertinent Minutes of Fein's Trial on November 18, 1964, pages 1674-1678

Trial Continued

Before:

Hon. GERALD P. CULKIN, J.S.C. and a Special Jury.

• • •

APPEARANCES: The same as previously noted.

• • •

(Present: Mr. Dermody, Mr. McKeever, Mr. Reynolds, Mr. Kleinman, Mr. Binder and the defendant.)

(The jurors and alternate jurors enter the court room and take their respective seats in the jury box.)

The Clerk: Part 32 is now in recess. Part 39, October 1964 Term continued is now in session.

Trial in the case of the People against Mark Fein is continued. The defendant, each of his counsel and the District Attorneys are present.

Jurors please answer.

(The names of the jurors and alternate jurors are called by the clerk.)

The Clerk: All the jurors and alternate jurors are present. The witness, Detective James Leman, is continued (1674).

Mr. Kleinman: May I approach the bench, if your Honor please?

The Court: Yes.

(The following discussion took place at the bench, out of the hearing of the jurors:)

Mr. Kleinman: Your Honor, I know that you have very scrupulously instructed the jury not to read and not to

discuss and not to comment on the case, all the usual admonitions and instructions were given that the jury should not be the least bit disconcerted from their duties here in the courtroom, and I appreciate that, and I want to thank your Honor for all the admonitions you have given the jury.

I just place before your Honor a column written by the columnist Jimmy Breslin of the New York Tribune. It is on the first page of the second section of the newspaper of November 18th.

In my opinion, the column—and I don't want to characterize it too much—is one which is extremely detrimental to the defense, and I should like to have the column marked as an exhibit, so that if any reference is made to it we will have something on the record to indicate what we are talking about (1675).

I should ask your Honor most respectfully to address the jury to find out if they happened to see or look at a column written by this Jimmy Breslin in today's Tribune.

The Court: Do you want me to do that in open Court or what?

Mr. Kleinman: I leave it entirely to your Honor. I don't want to make any fuss about it in open court, and I don't think it will do any good to do it in open court. It will simply accentuate it.

Mr. Dermody: Yes, that is the danger.

The Court: I will do it in the jury room.

Mr. Kleinman: May I have it marked?

The Court: It is marked for identification.

(New York Tribune for November 18, 1964 marked Defendant's Exhibit R for Identification.)

Pertinent Minutes of Fein's Trial

The Court: Mr. Renfroe, gentlemen of the jury: Do not discuss any fact or feature of the case. The jury will retire to the jury room.

(The following took place in the jury room, all the jurors and alternate jurors being present, and also all counsel.)

The Court: It has been called to the Court's (1676) attention that an article has appeared this morning on the first page of the second section of the Tribune. The whole column was in reference to this case. Have any of you gentlemen seen it?

A Juror: I saw it.

The Court: Did you read it?

A Juror: I saw it but I didn't read it.

The Court: I cannot admonish you more strongly than I am at the present time, and I have advised you time and time again not to look at or read anything pertaining to this case. Now, if you do so, gentlemen, you do so under penalty of a penal imprisonment. You have already been told that. Otherwise the whole case would have to be set aside and retried.

I tell you not to look at any papers or have anyone call anything to your attention concerning this case, or anything that may be written by anyone any place, at any time.

Now, is that definitely understood?

Nobody has read this article?

Jurors: No, sir.

The Court: Don't let this be a suggestion that you should inquire about it, because you are absolutely (1677) forbidden so to do. Thank you.

Pertinent Minutes of Fein's Trial

(The jurors and alternate jurors enter the courtroom and take their respective seats in the jury box.)

The Clerk: Trial in the case of the People of the State of New York against Mark Fein is continued. The defendant, each of his counsel and the District Attorneys are present.

Jurors please answer.

(The names of the jurors and alternate jurors were called by the Clerk.)

The Clerk: The jurors and alternate jurors are all present. The witness, Detective James Leman, is continued • • • (1678).